

A LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA

v.

**GOON INSTITUTION SDN BHD & ORS;
B SATERAS RESOURCES (M) BHD (THIRD PARTY)**

B
HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[CIVIL SUIT NO: S-21-65-2004]
22 FEBRUARY 2011

C ***CIVIL PROCEDURE:** Action - Cause of action - Cause of action against directors of 1st defendant company - Whether s. 46(1) of the Employees Provident Fund Act 1991 and non obstante clause excluded applicability of provisions of the Limitation Act to a joint and several claim against directors of 1st defendant company - Factors to consider - Evaluation of facts - Employees*
D *Provident Fund Act 1991, s. 46(1)*

***CIVIL PROCEDURE:** Action - Cause of action - Cause of action against directors of 1st defendant company - Whether the plaintiff should have exhausted all remedies against 1st defendant before pursuing action against its directors - Whether such provision existed in the Employees Provident Fund Act 1991 - Effect of*
E

***CIVIL PROCEDURE:** Action - Parties - Plaintiff bringing cause of action against certain directors of 1st defendant company - Effect of - Whether discretion to compromise with any of defendants had been prerogative of plaintiff - What disgruntled directors could do in such circumstances*
F

***CIVIL PROCEDURE:** Limitation - Time bar - Defendants raising defence of time bar against plaintiff's claim - Plaintiff's cause of action brought under the Employees Provident Fund Act 1991 - Whether action in conflict with Limitation Act 1953 - Interpretation of statutes - Factors to consider - Effect of - Whether statutory intent or scope of s. 65 of the EPF Act connected to issue of limitation - Limitation Act 1953, ss. 6(1) & 22 - Employees Provident Fund Act 1991, s. 65*
G

***CIVIL PROCEDURE:** Summary judgment - Delay in filing O. 14 application - Whether plaintiff delayed in filing application - Provisions of O. 14 Rules of the High Court 1980 - Interpretation of - Effect of - Rules of the High Court 1980, O. 14 r. 1(1) & O. 18 r. 2(2)*
H

***CONTRACT:** Contractual terms - Interpretation of terms - Non obstante clause - What it had been enacted for - Intention of Parliament*
I

STATUTORY INTERPRETATION: *Construction of statutes - Conflicting statutes - Whether provisions of the Employees Provident Fund Act 1991 and Limitation Act 1953 in conflict with one another - Whether both acts could be read harmoniously - Effect of*

The plaintiff was a body corporate established under s. 3 of the Employees Provident Fund Act 1991 ('EPF Act'). The 1st defendant, an 'employer' within the meaning of the EPF Act, had been liable to contribute the employer's portion of the employees' wages and deduct the employees' contribution from their wages and forward both portions to the EPF Board every month for the employees. The 2nd, 4th, 5th, 6th, 7th and 11th defendants were Directors of the 1st defendant. The 1st defendant faced financial difficulties and the employer's and employees' contributions were not made to the plaintiff. Thus, the plaintiff commenced this suit against the defendants. The issues that arose for consideration before this court were; (i) the interpretation of what was commonly referred to as a non obstante clause contained in expressions like s. 65(1) of the EPF Act *ie*, whether such a clause had been broad enough to render the Limitation Act 1953 ('LA') inapplicable so that the EPF Board could still pursue a civil action against the employer and its directors for outstanding contributions after the limitation period had set in and (ii) whether the two statutes had been in conflict with each other so that the EPF Act had overridden the LA or whether the two statutes could be read harmoniously with each other.

Held (allowing plaintiff's summary judgment application against the 1st, 2nd, 4th, 5th, 6th, 7th and 11th defendants only, subject to conditions):

- (1) The defendants had raised the issue of delay. Nowhere in O. 14 Rules of the High Court 1980 ('RHC') had it been stated that once a defence had been filed, the plaintiff had been required to show why he had not applied sooner. Order 14 r. 1(1) RHC had merely stated the earliest point in time when an application for summary judgment could be taken out. In a case where no defence had been filed and an order 14 application taken out, O. 18 r. 2(2) had been applicable. It could not be that just because there had been a delay on the part of the plaintiff in taking out a summary judgment application, the plaintiff had been precluded and prevented by O. 14 RHC from taking out such an application. (paras 9, 10 & 12)
- (2) Some of the defendants had raised the issue of limitation claiming that the plaintiff's action had been time-barred. There had not been any reason why the LA should be read in conflict with the EPF Act. The LA had been of general application covering a time frame

- A** within which one had to bring a civil claim. Thus, if the plaintiff had intended to bring its action as trustee of the Fund against the employer, it could not be prevented from doing so by any written law, but had to, like everyone else, subject itself to the overreaching provisions of the LA. Therefore, there had not been any conflict,
- B** rather a consistency that had been reasonable and rational. The statutory intent or scope of s. 65 of the EPF Act had not at all or even remotely been connected to the issue of limitation. If the LA was to be excluded or modified with respect to any civil claim, then surely it would have been reasonable that the Act concerned would have expressly stated so. (paras 15, 21 & 24)
- C**
- (3)** A non obstante clause introduces some liberty and license to the action referred to, prefaced no doubt by the expansive clause “Notwithstanding the provision of any other written law ...” and yet a limitation must of necessity be imposed lest the Act in question becomes a law unto itself, superior to all and subservient to none. Surely this was not the intention of Parliament. In bringing an action by way of a civil claim, the plaintiff had to follow relevant legislation like the Evidence Act 1950 and the RHC and any law that was said to have overridden it had to be such that in the event of a conflict,
- D** the overriding would only be necessary to give effect to an otherwise ineffective provision which would have to be resolved in favour of the legislative intent of the section of the Act having such a non obstante clause. (para 25)
- E**
- (4)** The EPF Act is a social piece of legislation designed to protect the savings of all employees that come within its ambit such that when they retire, there is left intact with dividends, the savings for old age where jobs might not come so easily and the fact that declining health would require one to set aside savings for medical expenses. However, a close scrutiny of s. 22 of the LA revealed that the exemption from the passage of limitation was given only to the beneficiary and not to the trustee which in this case had been the EPF Board. Thus, consistent with s. 6(1) of the LA, an action by the plaintiff under s. 65(1) of the EPF Act had to be brought within a period of six years from the date the last payment had been due. (paras 29 & 31)
- F**
- G**
- H**
- (5)** Section 46(1) of the EPF Act had been an unequivocal statutory cause of action against directors or responsible individuals and officers of errant entities. This section and the non obstante clause had nothing to do with excluding the applicability of the provisions of the LA to a joint and several claim against the directors of the
- I**

employer company. Thus the 2nd, 4th, 5th, 6th, 7th and 11th defendants as directors of the company, had been liable to the plaintiff. Where Parliament had used clear words to pin-point the persons jointly and severally liable in a social piece of legislation enacted to protect the compulsory savings of the workers for their old age and where workers' contributions had already been deducted from them but not forwarded to the EPF Board, the rationale for making the directors liable had been clear. Otherwise it would be all too easy for the directors to wash their hands of liability and to find a scapegoat in a director who did not have the means to pay. (paras 33, 34, 38 & 39)

- (6) The relevant defendants had not raised any evidence to rebut the plaintiff's *prima facie* evidence of the amount outstanding. In the absence of any credible and cogent figures to the contrary, the *prima facie* evidence of the plaintiff had stood un rebutted. (para 42)
- (7) The contention that the plaintiff should have proceeded against the 1st defendant as employer first and exhaust its remedy before proceeding against the other directors had been misconceived as nowhere in the EPF Act had it been stated that the plaintiff had to proceed against the 1st defendant first as the employer. In fact if this were so, the plaintiff might run the risk of being caught by limitation. (para 43)
- (8) On the contention that certain directors had not been included in the suit and that some directors had settled with the plaintiff for a paltry sum, the discretion to compromise with any of the defendants had been the prerogative of the plaintiff and the disgruntled director could still pursue his indemnity and contribution from the non-paying director who had been the director that had compromised with the plaintiff. (paras 43 & 45)

Case(s) referred to:

AG Varadarajulu & Anor v. State of Tamil Nadu & Ors AIR 1998 SC 1386 (refd)

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC (refd)

Cheong Yong Yin v. Lembaga Wang Kumpulan Simpanan Pekerja (High Court of Malaya at Kuala Lumpur in Civil Appeal No. R1-12-777-2004) (Unreported) (foll)

Goh Kong Hong v. Lembaga Kumpulan Wang Simpanan Pekerja (Kuala High Court (Special and Appellate Powers Division) in Civil Appeal No. R3-12A-294-09) (Unreported) (refd)

In Re Sateras Resources (Malaysia) Bhd [2005] 6 CLJ 194 HC (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v. Manfred Smisek & Ors [2009] 1 LNS 1719 HC (refd)

Lembaga Kumpulan Wang Simpanan Pekerja v. Shaharudin Omar & Ors [2008] 8 CLJ 684 HC (refd)

- A** *Lembaga Kumpulan Wang Simpanan Pekerja v. Adorna Rmit Sdn Bhd & Ors* [2003] 1 LNS 482 HC (**refd**)
Lembaga Kumpulan Wang Simpanan Pekerja v. Carimonde Sdn Bhd & Ors [2011] 6 CLJ 451 HC (**foll**)
Kekotong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor [2002] 7 CLJ 175 HC (**refd**)
- B** *Messrs Chuah Seah Joo Plywood Industry (Sarawak) Sdn Bhd & Ors v. Employees Provident Fund Board (High Court of Sabah and Sarawak at Sibu in Civil Appeal No. 12-4-2006) (Unreported) (refd)*
Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja [2009] 6 CLJ 586 CA (**refd**)
- C** *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424 CA (**refd**)
Tang Kwor Ham & Ors v. Lembaga Kumpulan Wang Simpanan Pekerja [2005] 8 CLJ 676 HC (**refd**)

Legislation referred to:

- D** Capital Markets and Services Act 2007, s. 358(1), (2)
 Civil Law Act 1956, ss. 7(5), 8(3)
 Companies Act 1965, s. 176
 Employees Provident Fund Act 1991, ss. 3, 45(3), 46(1), 49, 65(1)
 Limitation Act 1953, ss. 3, 6(1), 22
 Public Authorities Protection Act 1948, s. 2
- E** Rules of the High Court 1980, O. 14 rr. 1(1), 2(2)

Other source(s) referred to:

- Dr Choong Yeow Choy, “*Law of Limitation*” (1995), Butterworths, pp 162-165
- F** *For the applicants/plaintiff - Nor Shahadah Saari; M/s Shukor Balijit & Partners*
For the 1st and 5th respondents/defendants - Vinod Kamalanathan; M/s Vinod Kamalanathan & Assocs
For the 2nd respondent/defendant - V Rajadevan; M/s Rajadevan & Assocs
For the 4th respondent/defendant - Badrul Mumir Mohd Bukhari; M/s Shafee & Co
For the 11th respondent/defendant - Syed Shafiq Alhabshi; M/s Muhammad, Ganesan & Nazri
- G** *Reported by Sharmini Pillai*

JUDGMENT

- H** **Lee Swee Seng JC:**

Prologue

- I** [1] This case raises an interesting and intriguing argument on the interpretation of what is commonly referred to as a *non obstante* clause contained in expressions like in s. 65(1) of the Employees Provident Fund Act 1991 (EPF Act) that reads: Notwithstanding the provisions of

any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

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[2] Is such a clause wide and broad enough to render the Limitation Act 1953 inapplicable such that the EPF Board can still pursue a civil action to recover the contributions outstanding from the employer and its directors after the limitation period has set in? Are the two statutes in conflict with each other such that the later statute in the EPF Act overrides the Limitation Act or can the two statutes be read harmoniously with each other?

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C

Parties

[3] The plaintiff is a body corporate established under s. 3 of the EPF Act. The 1st defendant is an 'employer' within the meaning of the EPF Act and is liable to contribute the employer's portion of the employees' wages and also to deduct the employees' contribution from their wages and forward both the employer's and employees' portion to the EPF Board every month for the employees.

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[4] The 2nd, 4th, 5th, 6th, 7th and 11th defendants are directors of the 1st defendant during the respective material times pleaded and set out in the affidavit of the plaintiff in support of their application for summary judgment.

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Problem

[5] The 1st defendant went into financial difficulties and with that the contributions of both the employer and the employees were not made to the plaintiff. Plaintiff commenced this civil suit on 13 May 2004 not just against the 1st defendant as employer but also against all the directors who were directors for different material periods.

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Prayer

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[6] The plaintiff made some amendments to their statement of claim along the way to more clearly delineate who are the directors responsible for which period of contribution with reference to when they were directors. Finally the application for summary judgment application in court encl. 127 was filed on 9 November 2010. In between there was an application to join Sateras Resources (M) Bhd as a third party.

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Principles

[7] In an application under O. 14, the burden is on the plaintiff to establish the following conditions:

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- (i) that the defendant must have entered appearance;

- A (ii) that the statement of claim must have been served on the defendant;
- (iii) that the affidavit in support must comply with r. 2 of O. 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim.
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[8] Once those conditions are fulfilled, the burden then shifts to the defendants to raise triable issues. See the Federal Court case of *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544.

- C [9] The defendants in question also raised the issue of delay. The issue of delay in applying for summary judgment has been clarified by the Court of Appeal in *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424 where at p. 430-431, his Lordship N H Chan JCA pointed out that:

- D Delay in applying for O. 14 is no ground for defeating the plaintiff's right to summary judgment under O. 14 when there is no real defence disclosed. "If the plaintiff is precluded from the application for summary judgment, it would only mean unnecessary prolongment (sic I think the word is 'prolongation') of the case, resulting in a waste of time and added expense for the defendant company" said Raja Azalm Shah J (as he then was) in *Comptroller-General of Inland Revenue v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 at 100.
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- [10] Nowhere is it stated in O. 14 Rules of the High Court 1980 (RHC) that if the defence has been filed, then the plaintiff must show why he did not apply sooner. What O. 14 r. 1(1) RHC states is the earliest point in time when an application for summary judgment may be taken out. It is after the defendant has entered an appearance. The reason for that is obvious - if no appearance is entered than a judgment in default may be entered. Order 14 r. 1(1) reads:
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- G Where in an action to which this rule applies **a statement of claim has been served on a defendant** and that **defendant has entered an appearance** in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence
- H to such a claim or part except as to the amount of any damages claimed, **apply to the Court for judgment against that defendant.** (emphasis added)

- [11] In a case where no defence has been filed yet and an O. 14 application has been taken out, then O. 18 r. 2(2) provides that:
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If a summons under Order 14 rule 1, is served on a defendant before he serves his defence, paragraph (1) shall have no effect in relation to him ...,

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[12] With the consequence that the defendant does not need to file his defence within the stipulated time. As a corollary, if defence has already been filed, the plaintiff is not precluded from going for summary judgment if the plaintiff is of the view that the defence filed is a sham one and that there are really no triable issues. It cannot be that just because there has been some delay on the part of the plaintiff in taking out a summary judgment application, then the plaintiff is precluded and prevented by O. 14 RHC from taking out such an application. A sham defence if it is one, ought not to be in the court's file any longer than necessary. Indeed it should not be filed at all in the first place. Any delay cannot be prejudicial to the defendant but to the plaintiff and if the delay is too long, the court can always exercise its discretion not to grant the plaintiff costs even if it were to succeed.

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[13] Having dismissed that objection I proceeded to hear the plaintiff's application on its merits.

Liability Of The Employer Under s. 65(1) EPF Act

[14] The first prayer for the O. 14 application is for judgment to be entered against the 1st, 2nd and 11th defendants for the arrears of contribution of RM679,652 for the period from December 1994 to October 1996 and for the period of June 1998 to June 2002.

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[15] The relevant defendants have raised the issue of limitation in that as the claim was filed on 13 May 1998, all claims more than six years would have been time-barred. Counsel for the 2nd defendant, Mr V Rajadevan submitted that all claims prior to May 1998 would therefore be time-barred.

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[16] This argument brings into sharp focus the scope and ambit, the breadth and width of the *non obstante* clause in s. 65(1) of the EPF Act which reads:

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Notwithstanding the provisions of any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

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[17] I am grateful to my learned brother Varghese a/l George Varughese JC in his judgment in *Lembaga Kumpulan Wang Simpanan Pekerja v. Carimonde Sdn Bhd & Ors* [2011] 6 CLJ 451 in the High Court of Malaya at Penang in Civil Appeal No: 12A-403-2010 who at p. 458 of his judgment in dealing with a *non obstante* clause in s. 46(1) and s. 65(1) of the EPF Act made the following observations:

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A In the recent decisions of the Federal Court in *Perbadanan Kemajuan Kraftangan Malaysia v. DW Margaret David Wilson* [2010] 5 CLJ 899, Heliliah Mohamed Yusoff FCJ noted that “The term ‘notwithstanding’ means generally ‘not to stand against’ or ‘in the way’ or ‘overriding’ and went onto cite with approval a quote from the judgment of the Indian Supreme Court in *Union of India v. I C Lala* [1973] 2 SCC 72 at

B p. 77 which was as follows:

The words notwithstanding anything contained in the Code of Criminal Procedure found at the beginning of s. 5A(1) of the Prevention of Corruption Act 1947 (now s. 17 Prevention of Corruption Act 1988) **merely carved out a limited exemption from the provision of the Code of Criminal Procedure** in so far as they limit the class of persons who are competent to investigate offences mentioned in the section and to arrest without warrant. It does not mean that the whole of the Code of criminal procedure ... is made inapplicable. (emphasis added)

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[18] His Lordship Varghese a/l George Varughese JC went on to set out the right approach to interpreting a *non obstante* clause at p. 10 of his judgment by reference to the Indian Supreme Court case of *AG Varadarajulu & Anor v. State of Tamil Naidu & Ors* AIR 1998 SC 1386

E where at p. 1388 it declared:

It is well settled that in dealing with a non obstante clause under which the legislature wants to give overriding effect to a section, *the Court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section* ... the non obstante clause is no doubt a very potent clause intended to exclude every consideration arising from the provisions of the same statute but for that reason alone we must *determine the scope of the provision strictly. When the section containing the said clause does not refer to any particular provision which it intends to override but refers to the statute generally, it is not permissible to hold that it excludes the whole Act and stands alone all by itself. A search has, therefore to be made with a view of determining which provision answers the description and which does not.* (emphasis added)

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[19] My learned brother Varghese JC went on to explain thus at

H p. 11 of the judgment:

The extent of such intended exclusion must however be worked out from a further examination of the objective or scope or purpose behind the provisions where the non obstante clause is adopted. Only where then there arise a clash or conflict between the specific statutory objective behind that provision and such other law on the same subject, would the other law be held to be excluded from being operative.

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[20] What then is the exclusion that the *non obstante* clause in s. 65(1) of the EPF Act was supposed to effect? I agree with my learned brother Varghese JC at p. 16 of his judgment: A

... it was an enabling provision to provide for a right to civil recovery simultaneously with criminal prosecution and, more importantly, to overcome any contention that the cause of action to recover defaulted contributions was only vested in the employees concerned and not the Plaintiff's Board. In other words, it was contended that the provision was intended to give locus standi to the Board of the Plaintiff to institute civil proceedings to recover dues-notwithstanding the provisions of any other written law. (See: *Lembaga Kumpulan Wang Simpanan Pekerja v. Shaharuddin Omar & Ors* [2008] 8 CLJ 684.) B
C

[21] There is no reason why the Limitation Act should be read to be in conflict with the EPF Act. The Limitation Act is of general application covering a time frame within which one has to bring a civil claim. Therefore if the plaintiff intends to bring its action as a trustee of the Fund against the employer, it cannot be prevented from doing so by any written law but in so claiming it must still subject itself like everyone else must, to the overarching provision of the Limitation Act. There is thus no conflict but a consistency that is both reasonable and rational. The statutory intent or scope of s. 65 of the EPF Act was not at all or even remotely connected to the issue of limitation. D
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[22] In *Cheong Yong Yin v. Lembaga Kumpulan Wang Simpanan Pekerja* in the High Court of Malaya at Kuala Lumpur in Civil Appeal No: R1-12-777-2004, Her Ladyship Lau Bee Lan J observed that there is no inconsistency between the Limitation Act and the EPF Act as to when an action for the recovery of a civil debt may be brought and Her Ladyship held that the Limitation Act applies to a claim for civil debt such that a claim brought after the six year period from the date of the last payment was statute barred. Indeed if Parliament had wanted to exempt a civil claim for contribution by the plaintiff from the application of the Limitation Act 1953, it could have done so in clear and unambiguous language as s. 3 of the Limitation Act allows for it as it reads: F
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This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other written law or to any action or arbitration ... H

[23] For example a dependency claim under s. 7(5) of the Civil Law Act 1956 shall be brought within three years after the death of the deceased. Likewise s. 8(3) of the Civil Law Act 1956 provides that proceedings must be taken out not later than six months after the deceased person's personal representative takes out representation. Under I

- A s. 2 of the Public Authorities Protection Act 1948 the time frame is 36 months after the act, neglect or default complained of against any person for an act done in pursuance of any public duty or authority. The learned author Dr Choong Yeow Choy in his book entitled "*Law of Limitation*" (1995), Butterworths at pp. 162-165, referred to other statutes like the Income Tax Act 1967, the Railways Act 1991 and the Workmen's Compensation Act 1952.
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[24] Thus, if the Limitation Act 1953 is to be excluded or modified with respect to any civil claim then it is reasonable to state that the Act concerned would expressly refer to it in clear and unambiguous language. My own research leads me to s. 358(1) and (2) of the Capital Markets and Services Act 2007 where the relevant parts read:

358 Commission may recover loss or damage

- D (1) The Commission may, if it considers that it is in the public interest to do so, recover on behalf of a person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part VI or any regulations made under this Act, the amount of loss or damage by instituting civil proceedings against the other person whether or not the other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.
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- (2) **Notwithstanding the provisions of any written law relating to limitation of time**, an action under subsection (1) may be begun at any time within six years from the date on which the cause of action accrued or the date on which the Commission became aware of the contravention, whichever is the later. (emphasis added)
- F

- [25] A similar provision is also found in s. 357(1) and (2) of the Capital Markets and Services Act 2007. Thus one can say that a non obstante clause introduces some liberty and license to the action referred to prefaced no doubt by the expansive clause 'Notwithstanding the provision of any other written law ... 'and yet a limitation must of necessity be imposed lest the Act in question becomes a law unto itself, superior to all and subservient to none. Surely this cannot be the intention of Parliament. In bringing an action by way of a civil claim the plaintiff has to follow relevant legislation like the Evidence Act and the Rules of the High Court 1980 for instance and any law that it is said to have overridden must be such that in the event of a conflict the overriding is only necessary so as to give effect to an otherwise ineffective provision which has to be resolved in favour of the legislative intent of the section of the Act having such a non obstante clause.
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[26] I am not unaware of decisions to the contrary in the following cases: A

- (a) *Lembaga Kumpulan Wang Simpanan Pekerja v. Lim Kek Bee & Anor* (unreported) where Hadhariah JC held that the intention of the legislature was to exclude the applicability of other written law including the Limitation Act in so far as proceedings brought under the EPF Act was concerned; B
- (b) *Lembaga Kumpulan Simpanan Wang Pekerja v. Manfred Smisek & Ors* [2009] 1 LNS 1719 where Zabariah JC (as she then was) had concluded that by those qualifying words in s. 46(1) and 65(1) of the EPF Act, the provisions of the Limitation act had been effectively excluded in the case of proceedings brought pursuant to the EPF Act; C
- (c) *Messrs Chuah Seah Joo Plywood Industry (Sarawak) Sdn Bhd & 3 Ors v. Employees Provident Fund Board* in a case from the High Court of Sabah and Sarawak at Sibu in Civil Appeal No: 12-4-2006, where Linton Albert J held that s. 65 of the EPF Act demolished the argument that any claim by the EPF Board outside the limitation period would be statute barred. His Lordship followed the dicta of Azmel J (as he then was) in *Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor* [2002] 7 CLJ 175; [2002] 6 MLJ 186 at p. 191. D E

[27] Suffice to say that the *non obstante* argument was not marshalled in the above three cases. F

[28] About the strongest argument that could be raised against the applicability of the Limitation Act 1953 to a claim by the EPF Board for contributions not forwarded by the employer though the employer would have deducted the same from the employees concerned and thus stands in the position of a constructive trustee of the sums standing unremitted in whose favour the Limitation Act cannot be raised as a defence. Her Ladyship Lau Bee Lan J in *Goh Kong Hong v. Lembaga Kumpulan Wang Simpanan Pekerja* in Kuala High Court (Special and Appellate Powers Division) in Civil Appeal No: R3-12A-294-09, was persuaded by such an argument. Her Ladyship referred to s. 22 of the Limitation Act 1953 the material parts of which reads: G H

- (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action:

(a) I

A (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

B [29] I am conscious of the fact that the EPF Act is a social piece of legislation designed to protect the savings of all employees that come within its ambit such that when they retire there is left intact with dividends the savings for old age where jobs might not come so easily and the fact that declining health would require one to set aside savings for medical expenses. However a closer scrutiny of s. 22 of the Limitation Act reveals that the exemption from the passage of limitation is given only to a beneficiary and not the trustee which in this case C would be the EPF Board. I agree with Her Ladyship Lau Bee Lan J in her earlier decision in *Cheong Yong Yin's* case (*supra*) where she opined as follows:

D 5.2 I am in agreement with the learned Counsel for the Defendant that under s. 22 of the Limitation Act, only the beneficiary can invoke the section and not the trustee (EPF Board). "Beneficiary" is defined as "One entitled to his own benefit, ie, for whose benefit property is held (eg, by a trustee); "a person entitled to benefit under a trust" (see *Law Dictionary and Statutory Definitions*). Therefore the beneficiaries for the purpose of s.22 of the Limitation Act are the employees and therefore E the Plaintiff (the EPF Board) cannot have the locus to invoke s. 22 of the Limitation Act.

F [30] I need not have to and I express no opinion here as to whether employees would have any recourse against the EPF Board for taking more than six years to pursue contributions on behalf of employees.

G [31] I therefore hold that consistent with s. 6(1) of the Limitation Act 1953, an action by the plaintiff under s. 65(1) of the EPF Act must be brought within a period of six years from the date the last payment is due. In any event, at this O. 14 application stage, a triable issue has been raised with respect to the claim in prayer 1 for the claim against the 1st, 2nd and 11th defendants for the period of claim from December 1994 to August 1996

Liability Of The Directors Under s. 46(1) Of The EPF Act

H [32] There is also a similar provision in s. 46(1) of the EPF Act when it comes to the joint and several liabilities of directors in this wise:

I Where any contributions remaining unpaid by a company, ... then, **notwithstanding anything to the contrary in this Act or any other written law**, the directors of such company including any persons who were directors of such company during such period in

which contributions were liable to be paid ... shall together with the company, ... be jointly and severally liable for the contributions due and payable to the Fund. (emphasis added) **A**

[33] What is the legislative intent behind s. 46(1) of the EPF Act. I find myself in agreement with my learned brother Varghese JC in the *Carimonde Sdn Bhd*'s case above (*supra*) where His Lordship said at pp. 14-15 as follows: **B**

... it is clearly discernible from a reading of s. 46 of the EPF Act in its entirety that the legislative intent or purpose behind s. 46(1) was definitely to provide an additional right or recourse, jointly and severally, against directors or responsible individuals or officers of a defaulting company, partnership or association when, as the law ordinarily stood, there was no such right where the debtor was an incorporated company or the law was ambiguous in the case of partnerships and associations. (See also the decisions in *Ong Kim Chuan & Anor v. Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 6 CLJ 586 (Court of Appeal) and *Lembaga Kumpulan Wang Simpanan Pekerja v. Suasa Kristal (M) Bhd & Ors* [2009] 8 CLJ 236. In effect therefore, an unequivocal statutory cause of action against directors or responsible individuals and officers of errant entities was being created by this provision, namely s. 46(1) in the EPF Act. **C**

[34] Section 46(1) of the EPF Act and the *non obstante* clause has nothing to do with excluding the applicability of the provisions of the Limitation Act 1953 to a joint and several claim against the directors of the employer company. In *Ong Kim Chuan*'s case (*supra*) at p. 812, the Court of Appeal speaking through Ramly Ali JCA said: **D**

Under s. 46, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions were liable to be paid to the EPF) shall together with the company be jointly and severally liable for the contributions due and payable to the fund. These provisions are to be enforceable 'notwithstanding anything to the contrary in any other written law. **E**

[35] In the case of *Lembaga Kumpulan Wang Simpanan Pekerja v. Shaharudin Omar & Ors* [2008] 8 CLJ 684 Hishamudin Yunus J (as he then was) states at p. 688: **F**

In the first place s. 46 of the Act does not create to strict liability offence. Secondly, the board of directors of a company is the alter ego of the company. Hence, it was logical legally for s. 46 to make the directors liable for any non-payment of EPF contributions by the company **G**

H

I

A **[36]** In *Suasana Kristal's* case (*supra*) it was held by Balia Yusof J at p. 242 that:

Section 46 of the Act does not make any distinction between nominee, active or non-active director and neither is the word director defined under the Act. In law, there is no difference in the liabilities of these directors.

B

[37] In *Lembaga Kumpulan Wang Simpanan Pekerja v. Adorna Rmit Sdn Bhd & Ors* [2003] 1 LNS 482; [2003] 4 MLJ 729 at p. 734 it was held that:

C

Directors are the alter ego of a company. It is therefore not appropriate for a director to attempt to escape culpability by pleading that he is a sleeping partner or director, or a silent director or a non-active director.

D

[38] I therefore hold that as the plaintiff has exhibited the relevant searches from the Companies Commission of Malaysia showing the period when the 2nd, 4th, 5th, 6th, 7th and 11th defendants were directors of the 1st defendant, it does not matter if they were salaried directors not holding any shares in the company, or that they were taking on additional duties as directors by virtue of their seniority in the parent company though not being paid for the added responsibilities they now have to shoulder, or that they were nominees of Sateras Resources (M) Bhd, the third party who was supposed to take over the 1st defendant, or that they were non-executive directors attending board meetings only as and when required.

E

F

[39] Where Parliament had used clear words to pin-point the persons jointly and severally liable in a social piece of legislation enacted to protect the compulsory savings of the workers for their old age and when the workers' portion of their contribution had already been deducted from the workers but not forwarded to the EPF Board, the rationale for making all the directors liable is clear. Otherwise it would all be too easy for the directors to wash their hands of liability and to find a scapegoat in a director who has not the means to pay and who is not worse off even if adjudicated a bankrupt.

G

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Prima Facie Evidence Of Amount Owing In A s. 64 Certificate Under The EPF Act

[40] The status of such a certificate is found in s. 64 which states:

64. Certificate of authorized officer of the Board to be evidence.

I

In any legal proceedings, a certificate in relation to a claim on contributions payable and duly certified by an authorized officer of the Board shall be *prima facie* evidence of such certificate having been made and of the truth of the contents thereof.

[41] In *Tang Kwor Ham & Ors v Lembaga Kumpulan Wang Simpanan Pekerja* [2005] 8 CLJ 676 at p. 681, His Lordship Low Hop Bing J (as he then was) said: A

... the Plaintiff's authorized officer had duly certified and served on the company entries in the plaintiff's account in Form E reflecting the schedule of arrears for the entire period as alluded to above. Before the commencement of this action in the court below, there had been no dispute by the company as to the computation or the contents therein. Section 64 elevates the evidential weight of the certificates to the level of *prima facie* evidence of such entry and the truth of the contents thereof ... B

[42] The relevant defendants have not raised any evidence to rebut the plaintiff's *prima facie* evidence of the amount outstanding. The plaintiff had exhibited four Certificates to cover the amount outstanding for the periods stated in prayers 1 to 4. There was also exhibited various Form E which contains the particulars of the employees' names, their EPF numbers, and the period for which arrears of EPF contributions were due and payable by the employer. In the absence of any credible and cogent figures to the contrary the *prima facie* evidence of the plaintiff stands un rebutted. C

Other Issues D

[43] There were also other issues raised. It was contended that the Plaintiff should proceed against the 1st defendant as employer first and exhaust its remedy before proceeding and pursuing against the directors. This is misconceived as nowhere in the EPF Act is it stated that the plaintiff should so proceed against the 1st defendant first as the employer. In fact the plaintiff might run the risk of being caught by limitation if it does so. It was also raised that a certain director had not been included as a defendant and this is bad faith on the part of the plaintiff. Further it was alleged that the 3rd defendant had settled with the plaintiff for a paltry sum of RM50,000 when his liability was RM600,000. E

[44] The answers to these issues raised have been adequately answered by His Lordship Balia Yusof J in *Suasa Kristal's* case (*supra*) where at p. 241 it was held as follows: F

Black Law Dictionary (7th edn) defines the term joint and several liability as a liability that may be apportioned either among two or more parties or to only one or a few select members of the group, at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties. G

H

I

- A** The words ‘jointly and severally’ are defined as ‘persons who are jointly and severally bound to render themselves liable not only to a joint action against them, but also to a separate action against them individually’. It is open to the plaintiff to proceed against the defendant either against all of them in one action or separately against them in separate actions. (See: *Alliance Bank Malaysia Bhd v. Mukhriz Mahathir & Anor* [2006] 2 CLJ 723.)
- B**
- C** There is nothing wrong with the plaintiff’s action against the defendants in the present case and the failure to name the other two directors of the 1st defendant does not constitute an abuse of the court’s process or in any way frivolous or vexatious. The discretion to sue one, two or any of the directors of the 1st defendant lies on the plaintiff. To suggest that s. 46 of the Act imposes an obligation on the plaintiff to sue all the directors in one action amounts to importing words into the section and goes against the fundamental rules of interpretation of statutes ...
- D** [45] Likewise too the discretion to compromise with any of the defendants is the prerogative of the plaintiff and the disgruntled director may still pursue his indemnity and contribution from the non-paying director who the director that had compromised with the plaintiff.
- E** [46] Counsel for the 2nd defendant also argued that the High Court in *In Re Sateras Resources (Malaysia) Bhd* [2005] 6 CLJ 194 had held that present management of the petitioner are the ones that are obliged to make full payments to EPF Board. However the decision must be read in the proper context of a scheme of arrangement of the petitioner under s. 176 of the Companies Act 1965. In any event the court held at
- F** p. 212 that:
- ... before the court can approve the said Proposed Scheme, the court has to be fully satisfied that sufficient provisions be made for these two payments ie, deduction for KWSP contributions and Income Tax. In the present case, the proposed Scheme failed to provide for such
- G** provisions.
- H** [47] Hence the court did not approve the scheme and dismissed the petition with costs. As there was no decision in favour of the petitioner, there was nothing for KWSP as intervener to appeal against. There is no place for *res judicata* to have set in as contended by counsel for the 2nd defendant.

Pronouncement

- I** [48] With respect to the prayer against the 1st, 2nd and 11th defendant I hold that the claim from December 1994 to October 1996 is statute barred. As for the claim from June 1998 to June 2002 the Plaintiff had not exhibited the relevant certificate as the certificate issued had been for the whole period from December 1995 to October 1996 and from June 1998 to June 2002.

- Prayer 1: I therefore allowed summary judgment to be entered against the 1st, 2nd and 11th defendant only for the amount from April 1999 to June 2002 for the sum of RM547,653 as there was a certificate against the 4th defendant for the said period and the amount is the same for the 1st, 2nd and 11th defendant. The balance covering the period of June 1998 to March 1999 should go for trial as there was no way to arrive at the amount outstanding for that period based on the documents exhibited. **A**
B
- Prayer 2: I allowed summary judgment to be entered against the 4th defendant for the sum of RM547,653 for the contributions outstanding from April 1999 to June 2002 as per the certificate exhibited in exh. NSI5 at p. 82 of encl. 126; plaintiff's affidavit in support. **C**
- Prayer 3: I allowed summary judgment to be entered against the 5th defendant for the sum of RM482,456 for the contribution outstanding from July 1999 to June 2002 as per the certificate exhibited in exh. NSI5 at p. 83 of encl. 126; plaintiff's affidavit in support. **D**
- Prayer 4: I allowed summary judgment to be entered against the 6th and 7th defendant for the sum of RM19,421 for the contribution outstanding from may 2002 to June 2002 as per the certificate exhibited in exh. NSI5 at p. 84 and 85 of encl. 126; plaintiff's affidavit in support. **E**
F
- Prayer 5: I also allowed dividends to be claimed for the relevant periods for which judgments had been given at the rates set out in prayer five and as reflected in exh. NSI3. Enclosure 126 of plaintiff's affidavit in support and as provided in s. 45(3) of the EPF Act. **G**
- Prayer 6: I also allowed interests to be charged on the various judgments entered based on the interests rates shown in prayer 6 and as reflected in exh. NSI3, encl. 126 of plaintiff's affidavit in support and as provided in s. 49 of the EPF Act. **H**

[49] As for costs in this O. 14 application, as the plaintiff has succeeded only partially for prayer 1 and as there has been delay in the filing of this application this court makes no order as to costs. **I**